No. 17–494

IN THE
Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC.,
AND NEWEGG, INC.,
Respondents.

On Writ of Certiorari
to the Supreme Court of South Dakota

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AND INDIAN TRIBES IN SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities and promoting Indian self-determination and tribal economic development. For 15 years, NCAI has urged Congress to protect Tribes in the same manner as States when drafting any legislation authorizing States to require remote retailers with no physical presence in a State to collect and remit state sales or use taxes.[2]

The Cheyenne River Sioux Tribe of the Cheyenne River Reservation, the Crow Creek Sioux Tribe of the Crow Creek Reservation, the Flandreau Santee Sioux Tribe of South Dakota, the Lower Brule Sioux Tribe of the Lower Brule Reservation, the Oglala Sioux Tribe, the Rosebud Sioux Tribe of the Rosebud Indian Reservation, the Sisseton-Wahpeton Oyate of the Lake

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, NCAI Resolution #MKE-17-054 (Oct. 2017) and NCAI Resolution #GBW-05-028 (June 2005), http://www.ncai.org/resources/resolutions-home. In this effort, NCAI has been pleased to gain the support of the National Conference of State Legislatures (NCSL). *See* NCSL, *Relationship Between the Streamlined Sales and Use Tax Agreement and Tribal Governments* (May 2005).

Traverse Reservation, and the Yankton Sioux Tribe of South Dakota are federally recognized Indian Tribes with reservations in South Dakota. Like every rural community in America, the *amicus* Tribes and their members depend heavily on mail-order and online retail commerce. For many reservation residents, in-person shopping for some types of goods requires driving hundreds of miles roundtrip.

Given the significance of mail-order and electronic commerce to Indian country in South Dakota and across the Nation, *amici*'s goals of tribal self-determination and economic self-sufficiency depend in significant part on preserving for remote sales, no less than for face-to-face transactions, two fundamental features of federal Indian tax law: first, Indian Tribes' inherent sovereign power to raise revenue by taxing transactions in Indian country; and second, Indians' immunity from state and local sales taxes in Indian country, regardless of whether the tax is imposed on the Indian purchaser or on an Indian or non-Indian seller.

While recognizing that this case does not directly present an issue of federal Indian law, *amici* have a strong interest in ensuring that the Court's opinion does not inadvertently limit either tribal taxation authority or Indians' immunity from state sales and use taxes. It would be ironic indeed if, in removing old burdens on interstate commerce, the Court accidentally created new burdens on Indian commerce.

INTRODUCTION

Amici file this brief with a straightforward objective: Regardless of whether the Court affirms or reverses the judgment below, it should take care that nothing in its opinion suggests new limits on Tribes' authority to impose sales taxes or Indians' immunity from state sales taxes. Ideally, the Court would include a sentence in its opinion stating that its decision limits neither Indian Tribes' authority to impose sales or use taxes nor the immunity from state sales and use taxes currently enjoyed by tax-exempt purchasers, including Tribes and their members in Indian country.

At a minimum, in drafting its opinion, *amici* ask the Court to avoid any language that could be misinterpreted as suggesting that, (1) if the Court reverses the judgment below, a State could then impose sales taxes on goods that remote retailers deliver to ***any*** state residents, including reservation Indians, or (2) if the Court affirms the judgment below, a Tribe cannot impose sales taxes on goods that remote retailers deliver to Indians or to other persons living on Indian lands in the Tribe's Indian country.

This simple request is grounded in the Federal Constitution, this Court's Indian jurisprudence, and a body of federal statutes and regulations dating back more than two centuries. Article I's Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The three powers—over foreign commerce, interstate commerce, and Indian commerce—have very different applications, but they were all "given in the same

words, and in the same breath, as it were." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring). All three clauses "grant ... authority to the Federal Government at the expense of the States." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). All three clauses respect the dignity of sovereign governments: foreign nations, States, and Indian Tribes. And all three speak to issues of taxation.

Just as "interstate commerce may be required to pay its fair share of state taxes," *D. H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 31 (1988), Indian commerce should be required to pay its fair share of ***tribal*** taxes. For Tribes, no less than for States, when "startling revenue shortfall[s]" are triggered, "education systems, healthcare services, and infrastructure are weakened as a result." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

But tribal revenues have suffered not only when federal common law has limited Tribes' inherent power to impose and collect taxes, but also when it has allowed States to tax concurrently the same transactions that Tribes seek to tax. In the latter situation, given the unequal size, fiscal strength, and enforcement capabilities of the competing sovereigns, and given the practical impossibility of imposing both state and tribal taxes concurrently without driving away business and thus pushing Indian reservations deeper into poverty, it typically is the Tribe, not the State, that is forced to forgo exercising its sovereign power to tax. Thus, a "tribe's practical ability to tax [transactions] ... is inversely related to the state's

power to tax" them. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 437 (1993).

Under the Court's Indian tax precedents, absent a contrary treaty or statute, the general sales-tax rules—which this Court's opinion in this case should leave undisturbed—turn mainly on where and to whom the remote vendor delivers the purchased goods:

- Outside Indian country, transactions generally can be taxed by the State but not by a Tribe.
- Within a Tribe's Indian country, transactions with Indian buyers who are members of the Tribe can be taxed by the Tribe but not by the State.
- On Indian lands within a Tribe's Indian country, transactions with nonmember buyers can be taxed by the Tribe and in some circumstances also by the State (giving rise to double-taxation problems).
- On non-Indian lands within a Tribe's Indian country, transactions with nonmember buyers generally can be taxed by the State and in some circumstances also by the Tribe (again, giving rise to double-taxation problems).

The Court's resolution of this case need not affect any of these general principles of Indian-country sales taxation. *Amici* respectfully ask this Court to make that point expressly.

SUMMARY OF ARGUMENT

Regardless of whether it is effectuated by a decision of this Court or by an Act of Congress, the abrogation of the physical-presence rule articulated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), can readily be reconciled with the general principles of Indian-country sales taxation and with the pragmatic mechanisms that Tribes and States have developed to comply with those principles. *Quill* held that, absent congressional authorization, a State may not require a remote retailer that has no physical presence in the State (such as outlets or sales representatives) to collect and pay a sales or use tax on goods purchased for use within the State, because such a retailer lacks the substantial nexus with the taxing State that the Commerce Clause requires. *Id.* at 309–19.

Tribes, like States, have the inherent sovereign power to impose taxes on certain transactions. If South Dakota is permitted to tax items that a distant mail-order or internet retailer delivers to, say, Sioux Falls or Rapid City, then undoubtedly a Tribe can tax the same items when the same retailer delivers them to tribal members, or others living on Indian land, on the Tribe's reservation.

To the extent that States are permitted to tax remote sales, they cannot tax items delivered to the tribal government or tribal members in the Tribe's Indian country. Blackletter federal law renders reservation Indians and those who trade with them immune from state sales taxes. Any erosion of that rule would exacerbate the problem of double taxation.

Straightforward mechanisms, like Tribe/State intergovernmental compacts, state tax credits, and blanket exemption certificates, can protect these fundamental principles of Indian law—Tribes' power to tax, and Indians' immunity from state sales taxes—if either this Court or Congress abrogates *Quill*'s physical-presence rule.

ARGUMENT

I. Indian Tribes have the inherent sovereign power to impose sales taxes on purchases of goods in Indian country.

The Commerce Clause and numerous federal laws, treaties, and federal-court decisions recognize Indian Tribes as sovereign governments with the authority to collect taxes and to be immune from certain taxes. Tribal governments have the power and responsibility to enact civil and criminal laws regulating their members and their lands and have a great need for tax revenue to fund governmental services. Like States, Tribes operate courts of law, run correctional facilities, build and maintain roads and bridges, provide health care, and assist families in poverty. Tribes also have responsibilities resembling those of county and municipal governments: They fix sewer lines, provide emergency services, teach children, remove snow, build parks, collect trash, maintain cemeteries, conduct elections, put out fires, and police neighborhoods.

All sovereigns need tax revenues to fund governmental services and public goods. That is as true for Indian Tribes as it is for States—a point this Court has long recognized. *See, e.g.*, *Gibbons*, 22 U.S. (9

Wheat.) at 199 (States); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137–41 (1982) (Tribes); *Morris v. Hitchcock*, 194 U.S. 384, 388–89 (1904) (Tribes). And the sovereign authority to impose taxes includes taxing sales of tangible personal property, or goods, within the sovereign's territory. With limited exceptions under federal law, *see infra* pages 9–10, this power is held by Tribes no less than by States.

A. Tribes' taxation authority is an inherent sovereign power.

Each federally recognized Indian Tribe has the inherent power to tax sales on its reservation.[3] As the Court held unanimously in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), "[t]he power to tax members and non-Indians alike is surely an essential attribute of [tribal] self-government." *Id.* at 201 (citing President Reagan's Statement on Indian

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[3] For brevity's sake, this brief generally refers to "sales taxes" on "goods" delivered to "Indians" on their "reservation." As used here, however, the term "sales taxes" includes not only sales taxes that are imposed on buyers or on sellers but also similar taxes imposed on sellers such as "transaction privilege taxes" or "gross receipts" taxes, as well as complementary use taxes that are imposed on buyers but that the sellers have a duty to collect. The term "goods" includes all tangible personal property. The term "Indians" includes any federally recognized Indian Tribe that governs an area of Indian country, any agency or enterprise of that Tribe, any duly enrolled member of that Tribe, and any member-owned business, but excludes non-Indians and nonmember Indians (*i.e.*, enrolled members of a different Tribe). And the term "reservation" includes reservation lands and any other lands that qualify as the Tribe's "Indian country," as defined in 18 U.S.C. § 1151.

Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983)).

The Court explained the derivation of Tribes' taxation authority in *Merrion v. Jicarilla Apache Tribe*:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

455 U.S. at 137.

B. The scope of Tribes' taxation power is broad.

The scope of Tribes' taxation authority is broad. It covers all sales to the Tribe's members on the Tribe's reservation. It also covers all sales to nonmembers (including non-Indians) on land on the Tribe's reservation that is owned by or held in trust for the Tribe or its members. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650–53 (2001). And under certain

circumstances, a Tribe's taxation authority may cover sales of goods to a nonmember on reservation land held in fee by a non-Indian. *See id.* at 654–59.[4]

So, at a minimum, if goods are delivered to a tribal member or on Indian lands (or both), on a reservation, the Tribe governing that reservation can tax the transaction. Although tribal sales taxes often cover the same transactions as state sales taxes, at the same rate, Tribes are of course free to legislate their tax codes as they see fit and need not mirror the state code. *See generally* 25 U.S.C. § 1301(2) (broadly defining Tribes' powers of self-government).

C. The Executive, Congress, and the States all recognize Tribes' taxation authority.

Like the Judicial Branch, the Executive and the Legislative Branches have for many decades recognized Tribes' broad taxing authority. As for the Executive, regulations dating back to the 1970s expressly acknowledge Tribes' power to "assess[] and collect[] such fees or taxes as they may deem

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[4] Unless Congress has provided otherwise through treaty or statute, an Indian Tribe may tax nonmembers' activities on non-Indian fee land within its reservation if (1) the nonmembers have entered consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements, and there is a nexus between the tax and the consensual relationship, or (2) the nonmembers' conduct threatens or has some direct effect on the Tribe's political integrity, economic security, or health or welfare. *See Atkinson*, 532 U.S. at 654–59 (citing *Montana v. United States*, 450 U.S. 544, 565–66 (1981)).

appropriate from reservation businesses." 25 C.F.R. § 141.11(a). More than 80 years ago, the Solicitor of the Interior published a formal opinion stating that Tribes' sovereign power to tax "may be exercised over members of the tribe and over nonmembers." *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934), *cited in Kerr-McGee*, 471 U.S. at 199. And in 1900, when a merchant refused to pay a tribal tax, the Attorney General published a formal opinion instructing the Secretary of the Interior to shut down the merchant's business and remove him from the Tribe's reservation. *See* 23 Op. Att'y Gen. 214, 219 (1900).

Similarly, since at least the late nineteenth century, Congress has "acknowledged the validity" of taxes that Tribes impose on Indians and non-Indians alike. *Kerr-McGee*, 471 U.S. at 198–99 (citing S. Rep. No. 45-698, at 1–2 (1879)). Since the 1980s, the Internal Revenue Code has mandated that, when computing federal income-tax liability, tribal taxes are deductible to the same extent as state taxes. *See* Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871(a)(3). And the currently pending Senate bill that would effectively overrule *Quill* and allow States to tax remote sales by retailers with no in-state physical presence defines the term "State" to include Indian Tribes. *See* The Marketplace Fairness Act of 2017, S. 976, § 4(8), 115th Cong. (2017); *see also* The Marketplace Fairness Act of 2015, S. 698, § 4(8), 114th Cong. (2015); The Marketplace Fairness Act of 2013, S. 743, § 4(8), 113th Cong. (2013); The Main Street Fairness Act, H.R. 5660, §§ 5, 10(2)(C), 111th Cong.

(2010); Sales Tax Fairness and Simplification Act, S. 34, §§ 5, 10(3)(C), 10(6), 110th Cong. (2007).

Nor is such recognition limited to the Federal Government. States also have acknowledged Tribes' legitimate taxing authority. For example, the Multistate Tax Commission's formal policy statement on tribal/state issues notes that Tribes' "power to tax is just as much an inherent attribute of their sovereignty as it is to the States." Multistate Tax Commission, *Tribal–State Tax Issues*, Policy Statement 2009-01.[5]

The National Conference of State Legislatures has recognized Tribes' power to impose taxes, including sales taxes, as well:

> Tribal governments have the authority to collect taxes on transactions that occur on tribal lands, and tribal government revenues are not taxable by state governments.... Like state and local governments, tribal governments use their revenues to provide services for their citizens and develop government infrastructure. Unlike state governments, tribal governments most often are not in a position to levy property taxes due to the high percentage of land on Indian reservations that is held by the U.S. government. Income from natural resources, tribal businesses, and sales and

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[5] *Available at* http://www.mtc.gov/getattachment/The-Commission/Policy-Statements-Resolutions/Policy-Statement-2009-01.pdf.aspx.

> excise taxes are most often the only non-federal revenue source for tribal revenue departments.

Susan Johnson et al., National Conference of State Legislatures, *Government to Government: Models of Cooperation Between States and Tribes* 67–68 (2d ed. 2009) [hereinafter NCSL, *Government to Government*].[6]

Given the broad and longstanding acceptance of Tribes' on-reservation taxation authority, if *Quill*'s physical-presence rule is abrogated—whether by this Court or by Congress—there can be no doubt that every Tribe has the power to tax mail-order and internet retailers for remote sales of goods delivered to tribal members, or on Indian lands, on the Tribe's reservation.

II. Federal law limits States' power to impose sales taxes on purchases of goods in Indian country.

In contrast to Tribes' broad power to impose sales taxes on purchases on their reservations, States' taxing authority in Indian country is significantly constrained by federal law. The Court's opinion in this case should not disturb any of the well-settled sales-tax immunities that have long applied to various tax-exempt purchasers, including Tribes and their members in Indian country.

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[6] *Available at* http://www.ncsl.org/documents/statetribe/item019417.pdf.

A. States cannot directly tax Tribes or tribal members in Indian country.

As an initial matter, the Supremacy Clause, U.S. Const. art. VI, cl. 2, categorically bars States from imposing taxes directly on a Tribe or a member of the Tribe on the Tribe's reservation. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 127–28 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987).

This categorical rule focuses on location: Because the transaction occurs in the Tribe's Indian country, the State can tax neither the Tribe nor its members. However, an Indian residing and transacting business outside Indian country generally is subject to state taxes. *See Chickasaw Nation*, 515 U.S. at 462–64; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–50 (1973).

B. States cannot tax retailers' sales to Tribes or tribal members in Indian country.

Especially relevant here is federal law's prohibition of state sales taxes imposed on any retailer, on or off the reservation, who delivers goods to a Tribe or a member of the Tribe on its reservation.

From its earliest days, Congress has authorized sweeping and comprehensive federal regulation over persons who wish to engage in "Commerce ... with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3; *see Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 70 (1994). The Indian Trader Statutes, 25

U.S.C. §§ 261–264, which were originally enacted in 1790 and have remained unchanged for more than a century, were designed to protect Indians from fraud, economic hardship, and violent conflicts[7] by requiring businesspersons (typically non-Indians) to obtain a federal license before attempting to "introduce goods" and offer "merchandise ... for sale to the Indians" on a reservation. 25 U.S.C. § 264; *see id.* §§ 261–263.

Although the Indian Trader Statutes do not mention taxes, they do refer expressly to the "prices" that reservation Indians must pay for goods: Congress empowered the Commissioner of Indian Affairs (now the Secretary of the Interior) not only to issue and revoke Indian-trader licenses but also to promulgate "just and proper" regulations "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." *Id.* § 261; *see* 25 C.F.R. §§ 140.1–140.26, 141.1–141.59 (implementing the Indian Trader Statutes); *see also* Traders with Indians, 81

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[7] On January 4, 1790, Secretary of War Henry Knox wrote to President Washington with the outline of the first Indian Trader Statute: "[A]s Indian Wars almost invariably arise in consequence of disputes relative to boundaries, or trade, and as the right of declaring War, making treaties, and regulating commerce, are vested in the United States, it is highly proper [that the United States] should have the sole direction of all measures for the consequences of which they are responsible." Letter from Henry Knox to George Washington (Jan. 4, 1790), *in* 4 The Papers of George Washington: Presidential Series 529, 534–35 (Dorothy Twohig ed., 1993). Thus, from the beginning, exclusive federal regulation of trade with the Indian Tribes was driven less by paternalism than by the need to foster peaceful and respectful nation-to-nation relationships.

Fed. Reg. 89,015 (Dec. 9, 2016) (soliciting public comment on whether to update regulations).

In *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), the Court unanimously held that these statutes barred Arizona from imposing its gross-receipts tax (a type of sales tax) on a federally licensed trader that sold goods to Navajos at a retail store on the reservation. *See id.* at 686 n.1, 690. The Court concluded that the Indian Trader Statutes and the "apparently all-inclusive regulations" under them showed that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.* at 690. The Court added that the "financial burdens" imposed by a tax on a trader or its Indian customers could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 691.

Because the Court held that the state tax was preempted by the Indian Trader Statutes, it did not consider the trader's claim that the tax was also barred by the Indian Commerce Clause. *See id.* at 686. But that Clause still lay at the root of the Court's decision: "[W]e hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's ... because Congress in the exercise of its [Indian Commerce] power ... has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Id.* at 691 n.18 (citing U.S. Const. art. I,

§ 8, cl. 3); *see also Warren Trading Post Co. v. Moore*, 387 P.2d 809, 816 (Ariz. 1963) (Lockwood, J., dissenting), ("Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians—an area of commerce [that the States] delegated exclusively to the federal government in the Commerce Clause ...."), *rev'd sub nom. Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965).

Fifteen years later, the Court confirmed that federal law preempts state taxes imposed on non-Indians who sell and deliver goods to reservation Indians, regardless of whether the seller was federally licensed as an Indian trader or whether the seller maintained a place of business on the reservation. In *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), Arizona sought to impose the same gross-receipts tax at issue in *Warren Trading Post* on a one-time sale of tractors that an Arizona corporation delivered to a tribal enterprise, Gila River Farms, on the Gila River Reservation. *See id.* at 161, 164 & n.3. Unlike the trader in *Warren Trading Post*, however, Central Machinery Company had neither a place of business on the reservation nor an Indian-trader license. *See id.* at 164–65.

The tax was assessed against the non-Indian seller, Central Machinery, not the Indian purchaser, Gila River Farms. *See id.* at 162. Central Machinery added the amount of the tax as a separate item to the price of the tractors, which increased the total purchase price that Gila River Farms had to pay. *See id.* Central Machinery paid the state tax under protest and sued

for a refund, which it promised to pay over to Gila River Farms. *See id.* at 162 & n.2. Then-Judge Sandra Day O'Connor of the Maricopa County Superior Court held that the State lacked jurisdiction to tax the transaction and ordered the refund. *See State v. Cent. Mach. Co.*, 589 P.2d 426, 426–27 (Ariz. 1978) (citing trial court's opinion), *rev'd sub nom. Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980).

Following an appeal to the Arizona Supreme Court, this Court agreed with Judge O'Connor and held that the state tax could not be imposed on Central Machinery, concluding that the Indian Trader Statutes "apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." 448 U.S. at 165. As for the vendor's failure to obtain a federal Indian-trader license, the Court held that "[i]t is the existence of the Indian trader statutes, ... and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Id.* at 165.

Warren Trading Post and *Central Machinery* make clear that, in combination, the Indian Commerce Clause, the Indian Trader Statutes that Congress enacted using its Indian Commerce power, and the regulations the Executive Branch promulgated to implement those statutes preempt any sales tax that a State attempts to impose on a non-Indian off-reservation retailer who sells goods to a Tribe or its members and delivers them to the Tribe's Indian country. Regardless of whether *Quill*'s physical-presence rule is abrogated—by this Court or by Congress—States still could not tax these transactions.

To eliminate the risk of pointless litigation, however, *amici* urge the Court to make States' inability to tax these transactions clear in its opinion in this case.

C. Some sales to nonmembers in Indian country are subject to double taxation, which is inefficient and unfair to Tribes.

Purchases by non-Indians (or nonmember Indians) are treated differently: Generally, States view these transactions as falling squarely within their taxation authority.[8]

State taxes on some on-reservation purchases by nonmembers, when added to tribal taxes on the same transactions, gives rise to a problem of double taxation. (Recall that Tribes always have authority to tax sales of goods delivered to nonmembers residing on Indian land on the reservation, and sometimes have authority to do so on non-Indian fee land, as well. *See supra* page 10 and note 4.) *See generally Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173–93 (1989) (upholding

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[8] However, federal law preempts state sales taxes on reservation transactions even when the seller and the buyer are both non-Indian when there is "value generated on the reservation by activities involving the Tribe[]." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156–57 (1980); *see, e.g., Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434–35 (9th Cir. 1994); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 899 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988). And the State also cannot impose any tax that would "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

concurrent tribal and state taxes on the same transaction); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150–62 (1980) (same). This problem of double taxation could be exacerbated if the Court issues an opinion in this case that lacks the limiting language *amici* seek and thus could be misinterpreted as expanding States' authority to impose sales taxes in Indian country.

Charging two sales taxes would often make purchases prohibitively expensive for consumers and thus would weaken tribal economies. *See* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pitt. Tax Rev. 93, 95 (2005). As Justice Sotomayor recently explained, "double taxation would discourage economic growth," as firms "'may find it easier to avoid doing business on [Indian] reservations [than to] ... bear the brunt of an added tax burden.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2044 (2014) (concurring opinion) (citations omitted); *see* Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country* (Joint Occasional Papers on Native Affairs, Paper No. 2016-1, May 4, 2016 draft) (cataloging economic harms from double taxation in Indian country).[9]

Under current federal law, States can solve the double-taxation problem by allowing a credit for sales

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[9] *Available at* http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

taxes validly paid to Tribes. That approach is analogous to the Interstate Commerce Clause requirement that States allow credits for sales taxes validly paid to other States. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 191–95 (1995); 2 Jerome R. Hellerstein, Walter Hellerstein & John A. Swain, *State Taxation* ¶ 18.09[2], at 18-143 to 18-146 (3d ed. 2000); *see also* 26 U.S.C. § 901 (foreign tax credit).

In *Colville*, Justice Stewart would have held this approach to be mandated by the Indian Commerce Clause and congressional enactments under that Clause: "[W]hen a State and an Indian tribe tax in a functionally identical manner the same on-reservation sales to nontribal members, it is my view that congressional policy conjoined with the Indian Commerce Clause requires the State to credit against its own tax the amount of the tribe's tax." 447 U.S. at 175 (Stewart, J., concurring in part and dissenting in part). The majority in *Colville* declined to make these credits mandatory as a matter of federal law. *See id.* at 164. But some States have voluntarily "provide[d] a credit for any tribal tax imposed or enact[ed] a state tax that applies only to the extent that the [Tribe] fails to impose an equivalent tribal tax." *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 130 (2005) (Ginsburg, J., dissenting).

For example, in 1989, the Nevada Legislature recognized Tribes' authority to impose retail sales taxes on any person doing business on their reservations, Nev. Rev. Stat. § 372.800, and barred the State from collecting its own sales tax on those same transactions, so long as the Tribe's tax "is equal to or

greater than the [state] tax," *id.* § 372.805. Nevada's system has been lauded by the National Conference of State Legislatures:

> All Nevada state sales and excise taxes are waived for the purchase of any product sold on an Indian reservation, provided that a tribal tax that is equal to or greater than the comparable state tax is applied. This applies to all sales made on Indian reservations (from cigarettes to toilet paper to a loaf of bread), with the exception of gasoline. This arrangement ensures that the 17 tribes in Nevada will have an adequate tax base and recognizes that the services the tribes provide on their reservations will benefit not only tribal members but all who enter the reservation.

NCSL, *Government to Government*, *supra*, at 71; *see also* Nev. Att'y Gen. Op. No. 97-30 (Dec. 31, 1997).

Absent state legislation providing a credit for tribal sales taxes, the next-best solution to the double-taxation problem often is a State/Tribe compact governing tax administration and revenue sharing. *See infra* pages 28–29.

To be clear, *amici* believe that Tribes—to the exclusion of States and their political subdivisions—should have the sole authority to impose sales taxes on ***all*** purchases of goods delivered to their reservations (regardless of the buyer's or seller's status as a tribal member or nonmember, and regardless of the land's

status as Indian or non-Indian), and that Congress, or perhaps this Court in the appropriate case, should clarify that federal law mandates that result. But this case obviously does not present that question.

III. The Court's decision in this case can readily be reconciled with Tribes' taxation authority and Indians' immunity from state sales taxes.

Over the last 25 years, the fundamental principles of Indian tax law set forth above have proved compatible with the holding of *Quill*.[10] They would be equally compatible, however, with an Act of Congress or an opinion of this Court that overrules *Quill*.

A. Tribal sales taxes can remain protected.

As for tribal sales taxes, there is no reason to doubt that mail-order and internet retailers—regardless of whether they do or do not have a physical presence in the State where the Tribe's reservation is located—could fully comply with tribal law and pay tribal taxes on sales to reservation residents. According to respondents, there are already more than 16,000 taxing

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[10] This does not mean that nonmembers residing on Indian reservations always readily pay the tribal sales taxes they owe, or that States always respect the sales-tax immunities that federal law guarantees to Tribes and their members. *See, e.g.*, South Dakota Department of Revenue, *Tribal Tax Facts* 8 (Jan. 2018) (stating, incorrectly, that the State's 4.5% sales tax would apply if an off-reservation retailer sold goods to a tribal member and delivered them to the member's residence on the Tribe's reservation), https://dor.sd.gov/Taxes/Business_Taxes/Publications/PDFs/Tax%20Facts/Tribal.pdf. But those are issues of compliance and collection, not doctrine.

jurisdictions in the United States, mostly counties and other state subdivisions, whose tax rates must be applied by internet retailers when computing purchase prices for online orders. Petitioner suggests that respondents' figure is inflated,[11] but in any event the number is likely now to be well in excess of the "6,000-plus taxing jurisdictions" that this Court acknowledged a quarter century ago. *Quill*, 504 U.S. at 313 n.6. By contrast, there are only 573 federally recognized Indian Tribes, and many of them impose no sales taxes whatsoever. Some Tribes have no reservation or Indian country, and nearly half the Tribes are located in three States that impose no sales taxes (Alaska, Montana, and Oregon), making it less likely that the Tribes would impose their own sales taxes. So, in a post-*Quill* world, fully recognizing and implementing Tribes' authority to tax remote sales would only marginally increase the nationwide number of taxing jurisdictions whose laws remote retailers must comply with.[12]

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[11] *Compare* Br. in Opp'n 15–16, 26, *with* Reply Br. 9–12.

[12] Nonmembers who are exempt from the tribal sales tax, perhaps by virtue of residing on non-Indian fee land, could use the same mechanism described below (*see infra* pages 25–27)—blanket exemption certificates—to ensure that the Tribe does not tax their transactions. Presumably they would be taxed instead, often at the same rate, by the State.

B. State sales taxes in Indian country can remain limited by using blanket exemption certificates.

As for state sales taxes, the correct approach is simple: States and remote retailers must take the same steps to protect Tribes and their members that they take for all other tax-exempt entities and individuals. This is not difficult.

All States that impose sales taxes also provide exemptions for purchases by the Federal Government and by various individuals and entities, often including charitable, religious, and educational nonprofits. No two States have identical administrative and recordkeeping procedures, but the following description summarizes the most common approach.

To prove tax-exempt status, the buyer fills out a short form, known as an "exemption certificate," which typically is available for download from a state website. The certificate contains blanks for the buyer's name, address, and other identifying information, such as a tax ID number or driver's license number, as well as checkboxes and blanks to concisely explain the reason for the exemption, such as a checkbox labeled "Indian" or "Tribal" and a blank for the specific Tribe's name. The buyer signs and dates the certificate, usually below a printed statement explaining that the buyer is responsible for ensuring that she qualifies for the tax exemption and warning that she may be held liable for

the unpaid tax, interest, and civil and criminal penalties if she in fact is ineligible.[13]

Although a buyer can use a certificate for a single purchase, typically a blanket certificate remains valid for a period of years or until the information on the certificate becomes outdated (for example, if the buyer moves). When purchasing goods, the buyer provides a copy of a completed certificate to the seller (not to the State). The seller is required to keep the certificate in its records and to produce a copy to the State upon request, along with records of the buyer's transactions. So, with a blanket certificate, there is no need for the buyer to re-send the certificate when making subsequent purchases from the same seller.

So long as the seller did not solicit the buyer to unlawfully claim an exemption or otherwise commit fraud, keeping a copy of the buyer's certificate in its files absolves the seller of liability to the State for failing to collect the sales tax, even if the State ultimately determines that the buyer claimed the exemption improperly. And to avoid liability to a customer who properly claimed the exemption, the

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[13] For examples, *see* Washington State Department of Revenue, *Buyers' Retail Sales Tax Exemption Certificate*, Rev. 27 0032 (Aug. 4, 2017), https://dor.wa.gov/legacy/Docs/Forms/ExcsTx/ExmptFrm/BuyersRetailTxExmptCert_E.pdf; Streamlined Sales Tax Governing Board, Inc., *Streamlined Sales and Use Tax Agreement Certificate of Exemption*, SSTGB Form F0003 (rev. May 10, 2017, for use Jan. 1, 2018), http://www.streamlinedsalestax.org/uploads/downloads/Forms/F0003%20Exemption%20Certificate%20Revised%205-2017%20for%20use%20beginning%201-1-2018.pdf.

seller must merely accept the timely submitted, fully completed certificate and then not add the amount of the sales tax to the purchase price.

This system has long been in effect for face-to-face transactions in States that impose sales taxes. Applying it to remote sales by businesses that have an in-state physical presence has proved to be straightforward.[14] The same would be true for remote retailers that lack an in-state physical presence.

Of course, States have considerable flexibility here, so long as their administrative and recordkeeping procedures treat Indian Tribes and their members on par with other tax-exempt entities and individuals. What would not be permissible, however, is a system where, in lieu of blanket exemption certificates, the tax-exempt Tribe or individual Indian is required to pay the state sales tax and then, on a transaction-by-transaction basis or even an annual blanket basis, seek refunds from the State, or is required to seek advance permission from the State to make a tax-exempt purchase. *Amici* are not aware of any State that relies on such a system for all non-Indian tax-exempt entities and individuals. Indeed, it would be wildly inefficient and unduly burdensome to do so. Moreover, demanding payment and refund requests only from tax-exempt Indians would constitute unlawful discrimination. And it would violate this Court's blackletter rule that Indians should never pay state

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[14] *See, e.g.*, Amazon Tax Exemption Program, https://www.amazon.com/gp/help/customer/display.html/ref=aw?ie=UTF8&nodeId=201633510 (last visited Mar. 1, 2018).

sales taxes for on-reservation purchases. *See supra* page 14.

C. Problems arising from concurrent state and tribal tax jurisdiction can be addressed through state tax credits or intergovernmental compacts.

Aside from exemption certificates (*see supra* pages 25–27) and state tax credits (*see supra* pages 20–22), another tool that will help States and Tribes alike to comply with the key Indian tax principles, regardless of this case's outcome, is the intergovernmental tax compact, "the most beneficial means to resolve conflicts of this order." *Wagnon*, 546 U.S. at 130 (Ginsburg, J., dissenting) (citing sources). As of 1998, "[m]ore than 200 tribes in 18 states ha[d] created successful state-tribal compacts that are mutually satisfactory to both parties." NCSL, *Government to Government*, *supra*, at 67. That number is likely even higher today. Nearly all the Tribes in South Dakota now have tax-collection agreements with the State. Compacts can cover a broad range of state and tribal taxes, including sales taxes. *See, e.g.*, N.M. Stat. Ann. § 9-11-12.1 (authorizing State/Tribal cooperative agreements to administer, collect, and remit tax revenues).

Intergovernmental compacts are particularly valuable in avoiding double taxation when the Tribe and the State have concurrent jurisdiction, as is often the case when nonmembers residing on the reservation purchase goods. If *Quill*'s physical-presence rule is abrogated, then remote vendors will be collecting more sales taxes and there will be an increased risk that nonmembers living in Indian country will be subject to

both tribal and state sales taxes on their remote purchases. But this is no reason to revisit the tax landscape in Indian country. As explained above, double taxation of nonmembers is not a new problem, and it can be addressed by existing tools like state credits for tribal sales taxes (as Nevada has legislated) or intergovernmental tax compacts (as South Dakota has negotiated with some *amici*).

In the context of retail sales of goods, a compact typically could provide that one, but not both, of the jurisdictions would collect from the sellers the tax revenues for on-reservation sales and then periodically remit a predetermined percentage of those revenues to the other jurisdiction, while keeping the remainder. An intergovernmental compact focused specifically on the issues implicated in this case could eliminate reservation residents' need for exemption certificates. The compact could provide that the State collect sales tax at an agreed-upon rate on all remote sales delivered to the reservation, regardless of whether the buyer is a member or nonmember, regardless of whether the goods will be delivered to Indian or non-Indian land on the reservation, and regardless of where the retailer has a physical presence. The compact could then allocate to the Tribe an agreed-upon percentage of the revenues collected.

To determine whether a county or municipal sales tax should be added to the state sales tax, internet retailers already use software that differentiates delivery addresses in one county or municipality from addresses in a neighboring jurisdiction. The same could be done for reservation addresses.

D. Any fiscal impact will be minimal for the States, yet significant for the Tribes.

Finally, an opinion of the Court clarifying that the federal Indian-law principles summarized in this brief remain fully in place would not prevent States from gaining the benefits of a judicial decision (or a congressional act) abrogating *Quill*'s physical-presence rule. Indian country is relatively sparsely populated. The United States is home to 327 million people. Fewer than two million of them are Indians living on their Tribes' reservations.[15]

In their cert-stage filings, petitioner and respondents debated the potential fiscal impact of this case, suggesting that, nationwide, the annual uncollected sales-tax revenues might total between $3.9 and $20 billion annually.[16] So the stakes for tribal governments likely total in the tens of millions of dollars annually. That is a tiny fraction of what state treasuries stand to gain from abrogation of *Quill*'s

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[15] *See* U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 13 (Jan. 2012) (showing the 2010 nationwide Indian population on reservations, off-reservation trust lands, and other Indian statistical areas as 1,069,411), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf; U.S. Department of Health and Human Services, Indian Health Service, *Trends in Indian Health* 26 (2014 ed.) (showing the 2010 Indian Health Service's nationwide service population, outside of Alaska, where there are almost no reservations, as 1,849,129), https://www.ihs.gov/dps/includes/themes/responsive2017/display_objects/documents/Trends2014Book508.pdf.

[16] *See* Pet. 13–14; Br. in Opp'n 28–29; Reply Br. 10.

physical-presence rule. But it is a significant sum for the poorest demographic group in our Nation, its First Americans.

Sensitivity to this opinion's potential impact on tribal governments is extremely important, because the Court's ruling may set the terms for the sales-tax collection system for decades to come, and sales taxes are a critical source of government revenue for cash-strapped Indian Tribes. Like other responsible governments, Tribes seek to supply their citizens, and indeed all reservation residents, with the public services essential to their health and well-being. Fundamental fairness demands that tribal governments have the same opportunities to collect taxes as other jurisdictions within our federal system. Including appropriate limiting language in this Court's opinion will prevent countless years of litigation and avoid dealing an unintended blow to tribal self-governance and principles of equitable and efficient taxation.

CONCLUSION

Regardless of whether the Court affirms or reverses the judgment below, it should make clear that nothing in its opinion limits Tribes' authority to impose sales taxes or Indians' immunity from state sales taxes.

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